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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY COLEMAN,

Defendant and Appellant.

2d Crim. No. B151891  
(Super. Ct. No. PA038009-01)  
(Los Angeles County)

Anthony Coleman appeals a judgment after conviction of assault with a firearm, with a finding of personal firearm use. (Pen. Code, §§ 245, subd. (a)(2), 12022.5, subd. (a)(1).) We affirm.

### FACTS

Dominique D. belonged to the street gang, "Whitsett Street," and Coleman belonged to the street gang, "EWF" ("Every Woman's Fantasy"). According to the expert testimony of a police officer, the two gangs were rivals.

In 1998, Dominique encountered Coleman on the street. He made gang signs with his hands and shouted "Biscuit, Biscuit." Dominique considered the name, which rhymes with Whitsett, "disrespect[ful]" and "a challenge." Nevertheless, she ignored Coleman.

In the evening of September 8, 2000, Dominique and her friend Kia went to Kia's grandmother's residence in Pacoima to meet a friend. As they walked from Dominique's automobile to the house, they passed a white automobile in which Coleman was a back-seat passenger. Coleman twice called Dominique "Biscuit Bitch."

Dominique and Kia entered the residence but their friend was not there. As the girls left and walked away, the front-seat passenger of the white automobile, "Paul-Paul," called to Kia. The girls walked over to him. The driver, Josh Way, then called Dominique over to his window.

As Dominique approached Josh, Coleman said, "Biscuit Bitch . . . I'll kill you right now." Dominique believed that Coleman was "talking dumb." She responded to Coleman that he was "not worth [her] time."

Coleman then stuck his hand through the passenger window and fired a gun at Dominique. A bullet passed near her face and Dominique suffered a temporary hearing loss. She felt a "very strong warm wind" and a "tingling" sensation against her right cheek. Dominique felt "stuck" in place and she feared that Coleman might chase her.

Dominique and Kia returned to their automobile. Josh made a U-turn and drove away. Dominique and Kia then drove to a dance club in Lancaster. Dominique sat inside her automobile because she was too young to enter the club. After an hour or so, she saw Coleman using a telephone in the parking lot. He "mad-dogg[ed]" her.

Approximately six weeks later, Dominique was passenger in an automobile that stopped alongside another vehicle. Coleman, who was in the second automobile, threatened to "drag [her] up the street and beat [her] ass." Dominique returned home, informed her mother, and then reported the gun incident to Los Angeles police officers. She was frightened because Coleman "was everywhere."

Police officers interviewed Kia who was then living with Dominique's family. She informed the officers that Coleman fired a gun at Dominique and that Josh and Paul-Paul were then present.

Shortly before trial and at trial, Kia stated that although Dominique and Coleman argued, he did not have nor did he fire a gun at her. Kia stated that Dominique's mother had pressured her to lie in order to continue living with the family.

At trial, Josh testified that Dominique and Coleman argued the evening of September 8, 2000, but that Coleman had no firearm. Josh stated that Coleman, Dominique, and others were "hanging out" amiably later that evening in the dance club parking lot.

The jury acquitted Coleman of attempted murder, but convicted him of assault with a firearm. (§ 245, subd. (a)(2).) It found that he personally used a firearm pursuant to Penal Code section 12022.5, subdivision (a)(1). The trial court sentenced Coleman to a prison term of 14 years.

Coleman appeals and contends the trial court erred by instructing with CALJIC No. 2.52 ("Flight After Crime") and CALJIC No. 17.41.1 ("Juror Misconduct").

## DISCUSSION

### I.

Coleman argues that the trial court erred by instructing with CALJIC No. 2.52, regarding flight and consciousness of guilt. It provides: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

Coleman asserts that there is no evidence that he ordered Josh to drive away or that Josh drove away hurriedly. He points out that he saw

Dominique later that evening in the parking lot of the dance club. Coleman contends the instruction denied him a fair trial and due process of law, necessitating reversal. He also correctly points out that he did not waive this claim by failing to object to the instruction in the trial court. (*People v. Smithey* (1999) 20 Cal.4th 936, 982, fns. 7, 12.)

Generally, an instruction advising that evidence of flight may be considered with other evidence to determine guilt is proper where evidence shows that defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt. (*People v. Roybal* (1998) 19 Cal.4th 481, 517.) Flight does not require the physical act of running nor the reaching of a far-away haven. (*People v. Smithey, supra*, 20 Cal.4th 936, 982.) Return to a familiar environment from the scene of a crime, however, does not alone warrant an inference of consciousness of guilt. (*Ibid.*) The circumstances of departure from the crime scene may permit an inference of consciousness of guilt. (*Ibid.*; *People v. Turner* (1990) 50 Cal.3d 668, 694-695 [defendant left crime scene in haste to return to his home town].)

The trial court did not err because the evidence and reasonable inferences therefrom suggest that Josh drove away immediately after Coleman drew and fired a gun at Dominique. Josh testified that he told "everybody," "Let's Go. I'm leaving. I'm leaving now." Josh stated that he drove away because he did not want to "have [an argument] going on." Assuming that the prosecutor established that flight occurred, the jury could decide the weight of the evidence. (*People v. Turner, supra*, 50 Cal.3d 668, 695 [flight instruction merely allows jury to determine from relevant evidence whether flight had been proved].) Here Josh drove to a distant dance club immediately following the shooting. Although the jury could decide this response does not suggest a consciousness of guilt, another reasonable inference is possible. (*Ibid.*)

## II.

Coleman argues that the trial court erred by instructing with CALJIC No. 17.41.1, thereby denying him the constitutional rights to a jury trial, including jury unanimity and jury impartiality, and to due process of law. CALJIC No. 17.41.1 provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Coleman contends that the instruction impairs his constitutional right to jury nullification and involves the court in the sanctity of deliberations. (Evid. Code, § 1150; *United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 618 ["The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system."].) He argues that the instruction misinforms by implying that sanctions may follow nullification. Coleman asserts that the instruction impairs jurors' first amendment rights and their power to nullify. Finally, Coleman argues that CALJIC No. 17.41.1 affects the integrity of the trial and is a structural defect requiring reversal.

In *People v. Engelman* (Jul. 18, 2002, S086462) – Cal.4th – [2002 WL 1578778] our Supreme Court held that CALJIC No. 17.41.1 does not infringe upon a defendant's federal or state constitutional right to trial by jury or to his state constitutional right to a unanimous verdict and to the independent and impartial decision of each juror. Moreover, although a jury as a practical matter may have the power to engage in nullification, it has no legal right to do so. (*Ibid.*, ["[T]he jury has the duty to follow the court's instructions and . . . lacks the right to engage in nullification."]; *People v. Williams* (2001) 25 Cal.4th 441, 456.) Jurors must follow and apply the law as instructed and decide the case upon evidence presented at trial. (*People v.*

*Engelman, supra*, - Cal.4th -; *People v. Williams, supra*, 25 Cal.4th 441, 451.) Similarly, a defendant has no right to jury nullification, and it is inappropriate to instruct that jurors may nullify the law. (*People v. Nichols* (1997) 54 Cal.App.4th 21, 25 ["[T]rial courts are not required to instruct on the power of jury nullification even if the jury asks whether it has that power."].)

Although our Supreme Court concluded that CALJIC No. 17.41.1 does not violate a defendant's constitutional rights, it decided that the instruction posed an unnecessary and inadvisable risk to "the proper functioning of jury deliberations." (*People v. Engelman, supra*, - Cal.4th -, -.) For that reason, the court directed that the instruction no longer be given. (*Ibid.*) *Engelman* disposes of the arguments made here.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Randy Rhodes, Judge

Superior Court County of Los Angeles

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John F. Schuck, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief  
Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney  
General, Victoria B. Wilson, Supervising Deputy Attorney General, Jennifer  
A. Jadovitz, Deputy Attorney General, for Plaintiff and Respondent.